IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Petitioners,*

v.

MIDWEST VIDEO CORPORATION

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF FOR MIDWEST VIDEO CORPORATION

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### STATEMENT

This case involves the question of whether the Federal Communications Commission ("the Commission") has the authority under the Communications Act of 1934 to require community antenna television ("CATV") systems to originate programs as a condition of their remaining in business. The United States Court of Appeals for the Eighth Circuit ruled in opinion below[1] that the Commission did not have such authority.

[1] The opinion below is reprinted as Appendix A to the Petition for Certiorari. The various appendices to the Petition for Certiorari will be cited herein as "Pet. App. —" with reference to the appropriate appendix.

In order to place this question in perspective, it is ncessary briefly to review the history of the development of CATV regulation by the Commission. CATV had its inception in the late 1940's when systems commenced operation as a means of providing television signals to communities where normal television reception was poor or non-existent. At the outset, these systems were, for the most part, of limited capacity, providing service from generally no more than three television stations whose signals were captured directly off-the-air at a relatively high location and distributed by cable to subscribers. In these early stages of CATV development, the Commission at first largely ignored such operations and then, upon conducting an investigation of the matter, concluded that CATV was not an appropriate subject for Commission regulation.[2] As time progressed, the industry continued to grow and expand both in number of subscribers and number of television channels delivered to subscribers. In addition, CATV systems also began to distribute to their subscribers television signals originating from stations distant from the CATV community. Often these distant signals were delivered to the CATV system by means of microwave relay.[3] In view of these developments, the Commission, commencing in 1962 on a case-by-case basis, began to reassess its role with respect to the CATV industry and to exercise jurisdiction over it

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[2] *See Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" and the Orderly Development of Television Broadcasting,* 26 FCC 403 (1959).

[3] Microwave relay involves receiving television signals at a favorable receiving location and transmitting them by means of an intermediate relay station to locations where the signal of the originating station could not be received directly off-the-air.

in acting on applications for microwave authorizations.[4] Later, by rule making, the Commission asserted jurisdiction over all CATV operations where the television signals were received by means of microwave.[5] Ultimately, finding the unregulated growth of CATV systems, whether receiving signals off-the-air or by microwave, could have an adverse effect upon the development of free over-the-air broadcasting, and in particular upon the growth and development of UHF broadcasting, the Commission assumed jurisdiction over all CATV operations by adopting rules and regulations designed to minimize the impact of CATV development on the growth and continued vitality of the television industry.[6]

The regulations adopted by the Commission during this period related entirely to those functions of CATV systems which involved reception of signals transmitted by broadcast stations and their simultaneous transmission by cable to subscribers. Thus, the rules dealt with the signals which a CATV system was eligible to carry, those which it was required to carry, program exclusivity requirements which CATV systems were required to afford various classes of television stations, and the procedures for implementing these provisions. The validity of these rules and regulations was sustained by this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). In that decision, however, this Court emphasized that the only authority which

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[4] *See Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), *aff'd sub nom. Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359 (D.C. Cir. 1963), cert. denied, 375 U.S. 951 (1963).

[5] *First Report and Order*, 38 FCC 683 (1965).

[6] *Second Report and Order*, 2 FCC 2d 725 (1966).

it recognized the Commission to have over CATV was that "reasonably ancillary to the effective performance of the Commission's various reponsibilities for the regulation of television broadcasting" and that it was expressing no view "as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." *Id.* at 178.

The rules and regulations relating to CATV systems considered by this Court in *Southwestern* were silent with respect to the right or obligation of CATV systems to originate programs of their own. By means of case law, however, the Commission did commence to address itself to this subject. Thus, in the administrative proceeding in *Southwestern*[7] the Commission adopted an order with respect to one CATV system permitting it to originate some programs, but only on condition that no commercial sponsorships or commercial spots would be carried. Another system in the San Diego area was directed to originate programs (again on a non-commercial basis) as a condition of its right to import signals from Los Angeles.

On December 12, 1968, the Commission adopted its *Notice of Proposed Rule Making and Notice of Inquiry* 15 F.C.C. 2d 417,[8] instituting the proceedings which resulted in the promulgation of the rule which is the subject of this proceeding. In the *Notice,* the Commission announced its tentative conclusion "that, for now and in general, CATV program origination is in the public interest" but that "there may be a need for some regulation thereof, in order to insure operation

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[7] *Midwest Television, Inc.*, 13 F.C.C. 2d 478 (1968).

[8] The *Notice of Proposed Rule Making and Notice of Inquiry* is reprinted at pages 3-50 of the separate joint appendix to Petitioners' Brief which will be cited herein as "JA."

fully consistent with the public interest in the larger and more effective use of radio.'"[9] Accordingly, the Commission requested comments on two principal subjects. First, the commission asked whether it should impose upon some CATV systems a mandatory requirement of program origination. Specific suggestions were sought as to the minimum size of installation which should be subject to the mandatory origination requirement. Second, with respect to CATV program origination (whether voluntary or pursuant to the mandatory requirement) the Commission asked what economic basis should be permitted for such operations (e.g., commercial sponsorship) and what detailed operating rules should be prescribed in such areas as political broadcasts, fairness, sponsorship identification, and the like.

The Commission after considering the comments and submissions made by interested persons adopted a Report and Order and later a Memorandum Opinion and Order denying petitions for reconsideration (Pet. App. C and D). In these documents the Commission pointed out (Pet. App. C at 32) that there was general agreement by the CATV interests that program origination served the public interest and should be encouraged; broadcast interests took a contrary position. However, both CATV and broadcast interests were virtually unanimous in opposing mandatory origination. The Commission in its Report adhered to the view set forth in its Notice that it had the authority to compel CATV systems to originate programming and that the public interest would be served by the exercise of its authority. Addressing itself to the question as to which systems should be subjected to this require-

[9] JA at 7.

ment it set the figure at CATV systems having 3,500 or more subscribers. In so doing it relied upon cost estimates furnished to it by a manufacturer of cablecasting equipment (Pet. App. C at 39-40) which purported to show that the construction costs for cablecasting systems would range from $27,300 for a basic black and white system to $95,000 for a full color system and that annual operating costs would range from $14,300 for black and white systems to approximately $33,000 for color operations. The Commission concluded that no CATV system with 3,500 or more subscribers should be permitted to be or remain in the business of providing television broadcast signals to their subscribers unless "the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services." (Pet. App. C at 43, 53). Specific regulations to that effect were adopted by the Commission.[10]

Following the issuance of these regulations Respondent filed its Petition for Review. The Court below held that the mandatory origination rule was beyond the Commission's authority.

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[10] In the same proceeding the Commission also adopted rules and regulations governing program originations by CATV systems, whether undertaken voluntarily or pursuant to the Commission's madatory origination rule. Pet. App. C at 53-55; Pet App. D at 62-63. These rules and regulations are of the same character as are applicable to broadcast stations in such areas as equal time for political candidates, fairness, lotteries, sponsorship and pay-TV programming. The Court below did not pass on the validity or invalidity of these provisions.

## SUMMARY OF ARGUMENT

### I.

### A.

The Commission does not have the same jurisdiction over CATV as it does over broadcast stations. While the Government asserts that the Commission does have such jurisdiction, it cites no provision in the Communications Act to justify this conclusion. Its reliance on the recent Federal Elections Campaign Act is misplaced. While the Act includes CATV systems under the definition of broadcasting stations for the purposes of the Federal Elections Campaign Act it is clear both from the language of the Act and its legislative history that this definition is not for the purposes of the entire Communications Act but only with respect to the sections of the Act relating to political expenditures.

Moreover, even if it be assumed arguendo that a CATV system is a broadcast station for regulatory purposes, no showing has been made how this justifies the mandatory origination rule. The objective of the Communications Act is stated in Section 1 (47 U.S.C. § 151) to make efficient radio service available to all people of the United States. The method for achieving this objective so far as broadcasting is concerned is set forth in Section 307(b) of the Communications Act (47 U.S.C. § 307(b)) which directs the Commission to make as equitable allocation of broadcast facilities among the several states and communities but only "when and insofar as there is demand" for licenses, and modifications or renewals thereof. Under this grant of authority the Commission can choose amongst competing applicants or even deny an uncontested application on an inferior end-use theory (*Cf. Federal*

*Power Commission* v. *Transcontinental Gas Line Pipe Corp.*, 365 U.S. 1 (1961)) but cannot compel a person against his will to enter the broadcast business or to erect a station in a community not of his choice—no matter how well equitable allocation principles would be served by a station in such community. There is even less statutory justification for compelling CATV systems to undertake programming functions.

**B.**

This Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) upheld previous CATV regulations of the Commission on the ground that CATV operations are interstate communication by wire or radio within the meaning of Section 2 of the Communications Act (47 U.S.C. §152) and the particular CATV regulations were reasonably ancillary to the effective regulation of television broadcasting. The requirement that CATV systems originate programs has no ancillary relationship to the regulation of broadcasting.

The statutory responsibilities of the Commission to which the regulation of CATV operations has been found to be ancillary are five-fold:

(1) Establishment of areas or zones to be served by broadcast stations;

(2) Protection of television broadcast stations from unfair competition from CATV operations;

(3) Fostering the development of a nationwide television broadcast service through the maximum possible utilization of UHF channels;

(4) Allocation on a fair, efficient and equitable basis of broadcast facilities among the several states and communities; and

(5) Making available radio service to all of the people of the United States and encouraging the larger and more effective use of radio.

The requirement that CATV systems originate their own programs cannot possibly aid in the achievement of any of these objectives. Therefore, such a requirement cannot be deemed to be ancillary to the accomplishment of any of the objectives which the courts have heretofore recognized as having been entrusted to the Commission under the Communications Act of 1934.

II.

Mandatory program origination cannot be imposed on the theory that since CATV systems receive a benefit through carrying broadcast signals they can be compelled by the Commission to undertake affirmative action in exchange for this benefit which the Commission finds to be in the public interest. This basis for asserting authority to require CATV systems to engage in program origination is premised on the assumption that CATV systems are "authorized" by the Comission to carry broadcast signals and that the Commission has authority to withhold such authorization, or to grant it subject to whatever conditions it may deem appropriate. The right to carry broadcast signals and distribute them to subscribers, however, is not conferred upon CATV systems by the Commission. Although the Commission does have authority under the Communications Act to impose appropriate restrictions upon the reception and distribution of broadcast signals, the right of CATV systems to receive and distribute such signals is not itself conferred by the Commission. Broadcast signals are dedicated to the public by broadcast stations and the right to receive and distribute them may be exercised by anyone with the

capacity to capture such signals off the air. *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968).

Even assuming that the right to receive and distribute broadcast signals is conferred upon CATV systems by the Commission and can, therefore, be withheld altogether or granted subject to reasonable conditions, it is clear that this right could not be conditioned upon CATV systems entering into the entirely different activity of cablecasting. *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583 (1926); *Northern Pacific R.R. Co.* v. *North Dakota ex. rel McCue*, 236 U.S. 585 (1915); *Delaware, Lackawana & Western R. Co.* v. *Morristown*, 276 U.S. 182 (1928); *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Nav. Co.*, 288 U.S. 14 (1933).

## ARGUMENT

The Commission by its mandatory-origination rule has entered into a new and distinct phase of regulating CATV activities. In its prior actions it dealt exclusively with the reception functions of CATV systems. Those regulations were designed to control or limit CATV reception activities in an effort to protect the viability of television broadcast operations and to insure that these reception functions were consistent with the statutory objectives underlying the regulation of broadcast stations. By the instant action the Commission is entering a whole new field of activity. By administrative fiat it proclaims to all persons now in the CATV business or those who enter in the future that they may not confine themselves to the legitimate activity of receiving and distributing broadcast signals but that they must become program originators—if they choose not to do so they must terminate their CATV activities entirely.

The Government in its Brief argues that the Congress has given the Commission broad authority over all interstate and foreign communication by wire or radio and over all persons engaged in such communication. Building on this premise two different justifications for the Commission's rule are set forth. First, the regulation is an appropriate exercise of the Commission's authority with respect to interstate communication by wire or radio on the alternative theory that CATV systems are in effect broadcast stations or that the mandatory-origination requirement is reasonably ancillary to the Commission's responsibilities for the regulation of television broadcasting. Second, since CATV systems derive their basic or sole economic nurture from broadcasting, they are an integral part of broadcast transmissions and their enjoyment and retention of the economic benefits of the carriage of broadcast signals subjects them to the pervasive jurisdiction of the Commission. Neither point is well taken.

## I.

## THE MANDATORY ORIGINATION RULE IS NOT AN APPROPRIATE EXERCISE OF THE COMMISSION'S JURISDICTION OVER EITHER BROADCAST STATIONS OR CATV SYSTEMS

### A.

### CATV Systems Are Not Broadcast Stations Within the Meaning of the Communications Act and Are Not Subject to the Same Regulatory Authority of the Commission as Are Broadcast Stations

The Government has advanced a novel argument in this Court to sustain its mandatory origination rule.[11]

[11] This particular argument is made for the first time in this Court. This ground was not articulated by the Commission itself in the Reports which adopted the rule in issue nor was the argument made in the Government's Briefs in the Court below.

It urges that CATV systems are in effect broadcast stations for the purposes of the Communications Act and that accordingly the Commission has "essentially the same jurisdiction over CATV that it has over the broadcasting industry." (Br. 13) It cites no provision in the Communications Act on which it purports to rely for this conclusion. Instead, it constructs a fanciful argument based upon sheer assumption and speculation.

First, reference is made (Br. 13, fn. 10) to the Federal Election Campaign Act of 1971, Public Law No. 92-225, and in particular Section 104 which it cites as authority for the proposition "that the current Congress appears to assume that the Commission has broad authority to regulate CATV." The material cited has no bearing at all on the subject; in fact it points in the opposite direction. What Congress has done in Section 104 is to impose certain limitations on expenditures which may be made by candidates for Federal office. A limitation is set forth governing expenditures in all "communications media" which is defined (in Section 102 of the Act) to include broadcasting stations, newspapers, magazines, outdoor advertising facilities and telephone." No more than 60% of such amounts may be spent for use of broadcasting stations. The provision is then added that "for the purposes of this section" (not for the purposes of the entire Communications Act) the "term 'broadcasting station' includes a community antenna television system." Far from supporting the Government's argument Section 104 strongly implies that a CATV system is not a broadcasting station under the Communications Act. It takes a special statutory provi-

sion to make it so even for the limited purposes of political expenditures.[12]

Of equal flimsiness is the Government's attempt to find comfort in the fact that reporting requirements contained in the Senate Bill which became the Federal Election Campaign Act of 1971 were eliminated in conference because as stated by the Conference Committee "the FCC has adequate authority to require reports under existing law." However, the eliminated section required "broadcasting stations and candidates to file such reports as were required under FCC regulations." (S. Conf. Rep. No. 92-580, 92d Cong. 1st Sess., p. 26) The deletion of this section connotes no greater Commission jurisdiction over CATV than over candidates. The Commission has long had the authority to obtain information from persons not subject to its direct regulatory jurisdiction. *Federal Communications Commission* v. *Schreiber,* 381 U.S. 279 (1965); *Stahlman* v. *Federal Communications Commission,* 126 F2d 124 (D.C. Cir. 1941).

Second, the contrived argument is made (Br. 13) to the effect that it "seems logical" that if Congress had foreseen the development of CATV it would have wanted that industry to be regulated in furtherance of the same policy objectives that obtain with respect to the broadcast industry. Certainly more than such a statement is required for jurisdiction. Even if

[12] This reading is reenforced by the language of the Conference Report (S. Conf. Rep. No. 92-580, 92d Cong. 1st Sess., p. 27) to the effect that the "definition of broadcasting station incorporates the definition of broadcasting station used for purposes of the Communication Act, but adds to that definition community antenna television systems."

CATV and broadcasting were essentially the same, it would not necessarily follow that the same regulatory power was conferred by Congress over both industries unless a statutory basis can be shown for such a result. But the fact remains that the two industries are not the same. For as the Government itself recognizes (Br. 13-14) regulation of broadcasting is bottomed upon the need to allocate the limited resources of the broadcast spectrum—a scarcity factor which, the government admits, is not present in the case of CATV. Nevertheless the Government blithely brushes the point aside by simply asserting (Br. 14): "In all other respects, however, there is as much need for the Commission's regulation of CATV as of broadcasting." Such self-seeking statements do not create jurisdiction. This Court has recognized that the scarcity factor involved in broadcasting is an important foundation for the constitutional existence of Commission power over programming by broadcast stations—a power which may lack constitutional foundation in the case of non-scarce communications media. *Red Lion Broadcasting* v. *Federal Communications Commission*, 395 U.S. 367 (1969); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). Whether Congress can confer on the Commission the same authority over CATV that it possesses over broadcasting is not in issue here. But certainly the absence of the vital element of scarcity in the case of CATV is so fundamental that the existence of the authority claimed must be clearly shown by Congressional action—not simply by "it seems logical" recitations. No such congressional grant of authority has been shown to exist.

Finally, even if the Government's premise is accepted —i.e. that a CATV system is a broadcast station for

regulatory purposes—it does not follow that a mandatory origination rule would be valid. The Government assumes that result; it makes no effort to prove it. In fact, the statutory scheme is to the contrary.

The Communications Act forbids any person from operating a broadcast station without first obtaining a license from the Commission (Section 301 of the Communications Act, 47 U.S.C. § 301). Only qualified persons may obtain licenses and they are required to operate in the public interest (47 U.S.C. §§ 308, 309). The Commission is given specific authority to promulgate rules, regulations and policies governing the operation of the stations to make sure that the public interest is served. But nowhere is there any suggestion that a person may be compelled to enter broadcasting. Yet that is precisely what the Commission is undertaking to do by its mandatory origination rule.

The Government seeks to justify its action by relying on Sections 1 and 303(g) of the Communications Act (47 U.S.C. §§ 151 and 303(g)). The reliance is misplaced. Section 1 states that the purpose of the Act is "to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." Section 303(g) directs the Commission to "encourage the larger and more effective use of radio in the public interest." These Sections, however, confer no authority as such on the Commission. They simply set forth statutory objectives; the achievement of these objectives must be by means of powers set forth in other portions of the Act. Broadcasting is specifically declared by Section 3(h) (47 U.S.C. § 153(h)) not to be a common carrier. Hence, entry into the field is voluntary and no power exists to force a broadcaster to ex-

pand his chosen field of activity—in contrast to common carriers where Section 214 of the Communications Act (47 U.S.C. § 214) specifically authorizes the Commission under closely defined standards to require carriers to expand their activities.[13]

In the field of broadcasting the manner of achieving the objective of making efficient radio service available to all people of the United States is set forth in Section 307(b) (47 U.S.C. § 307(b)). This section directs the Commission to make an equitable allocation of broadcast facilities among the several states and communities but only "when and insofar as there is demand" for licenses and modifications and renewals thereof. In other words, the Commission is not given a carte blanche to initiate broadcast stations. It cannot compel a person against his will to enter the broadcast business. Nor can it compel a person who desires to locate a station in city X to apply for a station in city Y even though city Y may have a greater need for the facilities than city X. The only power available to it is to choose between competing applicants for the same facilities to be utilized in different communities, denying the application for city X as against one requesting the same facilities in city Y, if there is a greater need for the station in city Y than in X. But the Commission cannot compel an applicant desiring to locate in

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[13] Even common carriers operating under statutes with provisions similar to Section 214 cannot be constitutionally compelled under guise of an order ostensibly to extend their existing lines to undertake to construct what is in effect a new line simply because the regulatory agency believes the area in question urgently needs service. *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Nav. Co.*, 288 U.S. 14 (1933).

city X to specify city Y because of the greater possible need for service in city Y.[14]

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[14] The end-use theory of regulation upheld by this Court in *Federal Power Commission* v. *Transcontinental Gas Line Pipe Corp.*, 365 U.S. 1 (1961) is in accord with the delineation of Commission jurisdiction described above. The Government (Br. 17) cites *Transcontinental* but does not explain its purported significance. In the Court below the Government relied heavily on this case and its end-use regulation theory as establishing the right of the Commission to condition CATV carriage of broadcast signals on such CATV systems becoming program originators. The Court below (Pet. App. A p. 25) held that the reliance is misplaced.

*Transcontinental* involved an application by a pipe line company for a certificate of public convenience and necessity permitting the interstate transportation of natural gas which a public utility had purchased directly from a producer. The direct sale of the gas from the producer to the public utility was clearly beyond the scope of the Power Commission's regulatory authority; however, the pipe line company which contracted to deliver the gas from the producer to the public utility could not transport the gas without obtaining a certificate of public convenience and necessity from the Power Commission. The Power Commission denied the application for a certificate on the ground, among others, that the gas was to be transported for use under industrial boilers, a use deemed to be "inferior" from the standpoint of conserving a valuable natural resource. This Court held that it was appropriate for the Power Commission to take into account the use which would be made of the transported gas in determining whether the issuance of the requested certificate would be in the public interest. Thus, even though the Power Commission could not directly regulate the use to which the public utility proposed to devote the gas, the Court held that the use could be weighed by the Power Commission in exercising its jurisdiction over the certification of pipe line transmission of gas. While sustaining the Power Commission's authority to refuse a certificate because of "end use" considerations, this Court was careful to point out that the agency could not go beyond the denial of a certificate to prevent an inferior use and require the gas to be devoted to an "end use" which it favored. The Court stated (365 U.S. at 17):

> The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power

Other analogies can also be found in the broadcast field. Broadcasting commenced in the standard broadcast field (AM broadcasting). Then came FM broadcasting and finally television. At the outset great risks were involved in commencing operation in these new fields. When these new services were being established, it was Commission policy to encourage AM operators to enter the FM and TV field; the inducements were particularly manifest with respect to UHF operation. Yet, neither the Commission nor anyone else ever suggested that the Commission's authority under Sections 1, 303(g) and 307(b) was broad enough to compel such AM operators to construct FM or television stations. Desirable as is the objective to have all people of the United States enjoy FM or television broadcast service, there is no basis for concluding that the Commission could order the owner of an AM station to construct and operate an FM or TV station in the same community or elsewhere.

By the same token it is difficult to see how a CATV system engaged in reception activities can be compelled by the Commission to undertake program origination activities. Merely calling CATV a broadcast station creates no such power. Nor is Commission power established by the plaint (Br. 14) that from the standpoint of the television viewer government regulation of CATV is necessary because the viewer can easily flip the dial between broadcasting and cablecasting chan-

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over proposed transportation and it can only do this when a balance of all the circumstances weighs against certification.

Consistent with *Transcontinental* the Commission can in assigning scarce radio frequencies weigh the use to which they will be put. But having assigned such frequencies and having made its "end-use" determination, it cannot take the next step of forcing the user of radio frequencies to undertake a different activity.

nels. Without regulation of CATV, the Commission fears, important policies such as equal opportunities for candidates, fairness, etc. would be undermined. But this is beside the point. The most that this argument can prove is that if CATV systems do originate programming, Commission program regulations should apply to them. But as has been pointed out the Commission has promulgated rules governing CATV program operations and the opinion of the Court below has not affected their validity. But merely because the Commission may have authority to regulate the conduct of CATV programming does not mean that the Commission can compel a CATV system to originate programs.

B.

**The Mandatory Origination Requirement for CATV Systems Is Not Ancillary to Any Responsibility Which the Commission Has for the Regulation of Broadcasting**

The Government in reluctant recognition that this Court's holding in *Southwestern* restricted its approval of the Commission's authority to regulate CATV to regulation "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (392 U.S. at 178) has made an effort to address itself to the ancillary nexus between mandatory origination and broadcast objectives. However, it does so not by an affirmative showing of what broadcast objectives are served either directly or in an ancillary manner by mandatory CATV origination but rather by characterizing the opinion of the Court below as holding that "Congress intended to restrict the Commission to regulation designed to prevent deleterious competition with the broadcasting industry" (Br. 16). This is not an accurate reading of the Court's opinion. It found

absence of Commission jurisdiction based upon a showing in the briefs that no ancillary relationship existed between the mandatory origination rule and any responsibility the Commission has with respect to television broadcasting.

The broadcasting statutory objectives to which CATV regulation has been said to be ancillary have been spelled out by the Commission in its various decisions and reports and orders. The following five objectives have been relied upon:

1. The power to establish areas or zones to be served by broadcast stations.

2. The power to protect television broadcast stations from the unfair competition of CATV.

3. The power to protect and foster UHF stations.

4. The accomplishment of the objectives of Section 307(b) of the Act.

5. The duty to make radio service available and to encourage the larger and more effective use of radio.

The mandatory origination rule is irrelevant to all of these objectives.

1. *The power to establish areas or zones to be served by broadcast stations*—Section 303(a) of the Communications Act (47 U.S.C. §§ 303(a)) authorizes the Commission to classify radio stations and Section 303(h) (47 U.S.C. § 303(h) ) authorizes the Commission to prescribe the areas or zones to be served by radio stations. Under this authority the Commission has

asserted jurisdiction to compel CATV systems to carry local signals—this is deemed to be ancillary to the Commission's responsibility to assure that each station is capable of being received on all sets located in its prescribed service area—and to prohibit the unrestricted importation of distant signals—this is deemed to be ancillary to the Commission's responsibility to prevent a station's signal from being extended beyond the area the station is designed to serve (unless a showing is made that such extension will serve the public interest). The requirement that CATV systems originate programs just has no relationship whatsoever to either objective.

2. *The power to protect television broadcast stations from the unfair competition of CATV*—Throughout the Commission's reports [15] adopting CATV rules and regulations runs the theme that CATV systems, in carrying the signals of broadcast stations, pay no fee for copyrighted programs and hence have an unfair competitive advantage against local television stations which must pay for their programs. The point is made that the CATV system, by bringing in signals not readily available in the market, fractionalizes the audience available to the local television stations and hence tends to deny local stations some of the economic means necessary for them to operate and pay for programs. This is deemed to be unfair competition and the Commission believes that regulation of CATV systems is reasonably ancillary to its duty with respect to television broadcasting by limiting or eliminating the effects of this unfair competition.

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[15] See, e.g. *Second Report and Order*, 2 F.C.C. 2d 725, 778-81 (1966). *Notice of Proposed Rulemaking and Notice of Inquiry*, J.A., at 16-17.

It is difficult to see how the subject of compelled origination of programs by CATV systems has any relationship whatsoever to the concept of unfair competition. While television broadcast stations may be understandably concerned with a new medium competing with them by originating programs, the plain fact is that so far as mandatory origination is concerned such competition flows not from CATV volition but from Commission-compelled conduct. Far from insulating television stations from CATV activity, the Commission's order pits CATV directly against television stations and forces CATV systems to compete with television stations both for audience and advertisers. We would have a classic case of bootstrapping if the Commission could base its power on its own order requiring CATV systems to originate programs and then justify such order on the basis that the originated programs may have competitive effects on television broadcast stations.

3. *The power to protect UHF stations*—The Commission has gone to great lengths to explain the importance of UHF stations: with only 12 VHF channels, effective utilization must be made of the 57 VHF channels if a truly nationwide system of television is to exist. The economic difficulties UHF stations confront and the adverse effect on their operations implicit in unrestricted CATV activities are of concern to the Commission. It is a well established fact that television operations are expensive and hence require relatively large markets to provide an economic base for viability. Thus, the Commission has concluded that the top 100 television markets are the ones which can generally be regarded as the most likely to provide adequate economic support for UHF operations.

Uncontrolled CATV activity in such top 100 markets could, according to the Commission, prove detrimental to UHF development and thus frustrate the Commission's utilization of UHF to achieve its overall allocations goals.

While the CATV industry has not conceded that Commission fears for UHF from CATV operation are real or well founded, the short answer so far as mandatory origination is concerned is that the Commission's action has no possible relationship to aiding UHF stations. First, the mandatory origination requirement is not limited to the top 100 markets where the Commission focuses its concern for UHF stations. Second, and more importantly, it is not possible to show how UHF stations are in any way aided by a Commission order requiring CATV systems to originate programs. If anything, arguments and policy considerations previously relied upon by the Commission for protecting UHF point in a direction exactly opposite to mandatory program origination.

4. *The Accomplishment of the Objectives of Section 307(b)*—Section 307(b) of the Communications Act (47 U.S.C. § 307(b)) directs the Commission in passing upon applications for broadcast stations to make a fair, efficient and equitable allocation of stations among the several states and communities. The regulation of CATV reception functions is deemed to be ancillary to this section because the undue importation of signals may cause broadcast stations to lose their economic ability to survive. If this happens, the mandate of Section 307(b) is disturbed in that there is a reduction in the number of broadcast stations available to the several states and communities.

It is difficult, however, to see how a requirement that CATV systems originate programs is in any way related to this objective. Indeed, the mandatory origination of programs can, if anything, have the same effect on local television stations as the importation of signals. While CATV systems which voluntarily originate programs do perform a valuable function in providing a new voice in the community, it is difficult to see how a mandatory requirement for that purpose can be said to aid the Commission in preserving the availability of broadcast stations to the several states and communities.

5. *The duty to make radio service available and to encourage the larger and more effective use of radio.* Section 1 of the Communications Act (47 U.S.C. § 151) states that the purpose of the Act is "to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service". Section 303(g) (47 U.S.C. § 303(g)) directs the Commission to encourage the larger and more effective use of radio in the public interest. From these two sections the Government argues that, pursuant to this mandate, the Commission can require mandatory origination of programs so that a maximum number of communities will have their own outlets for local self-expression.

However, as has been pointed out with respect to a similar argument as to broadcast stations (supra pp. 15-16) these provisions merely state objectives; the achievement of these objectives must be by means of power set forth in other portions of the Act. In the broadcast field itself we have already shown that the Commission has been given no authority to compel this result. It can only encourage the process by making

frequencies available and by passing upon applications for stations by qualified applicants.

The same rationale obtains in the CATV field. A person who enters into the CATV business, does so for the purpose of receiving television signals and distributing them to subscribers. Traditionally, these functions have been carried out by CATV systems distributing in an unaltered manner the programs of the originating stations. This activity by CATV has been held to be communication by wire or radio and subject to reasonable Commission regulation. The CATV operator may, if he chooses, also engage in other business activity. He may publish a newsletter, produce programs, provide fire or burglary services, or any other type of activity. Whether such activities, if voluntarily undertaken, would be communication by wire or radio and subject to Commission jurisdiction is a moot matter. But to say that the Commission can order the CATV system to undertake such additional activities because they are desirable services, would be to confer upon the Commission the authority to impose more stringent conditions on the conduct of activities ancillary to its area of primary responsibility than it can impose upon its broadcast licensees.[16]

[16] It is anomalous to compare the Commission's expressed concern about its obligation to encourage the larger and more effective use of radio in the public interest by requiring CATV systems to originate programming with its actions with respect to CATV voluntary originations. Prior to the instant proceeding Commission policy was directed to discouraging CATV systems from originating programming by forbidding CATV systems to sell time to advertisers to support the programming. See e.g. *Midwest Television, Inc.*, 13 FCC 2d 478 (1968). Even in the instant proceeding the Commission is not wholly committed to the idea of program origination by CATV. Thus the Commission's rules provide (see Pet. App. C, at 45, 55) that a CATV system may sell

The Government (Br. 19) expresses the fear that "denial of jurisdiction in the Commission to regulate CATV systems which transmit broadcast signals would open the door to disparate state and local regulation of CATV services in contravention of the objectives of uniform and integrated regulation which Congress sought to achieve." But no argument is being made here that the Commission has no jurisdiction to regulate CATV systems which transmit broadcast signals. Both this Court in *Southwestern* and the Court below in an earlier opinion (*Black Hills Video Corp.* v. *Federal Communications Commission*, 399 F. 2d 65 (1968) sustained Commission jurisdiction when the regulation of CATV was reasonably ancillary to broadcast objectives. Nor did the Court below in the instant case pass upon the authority of the Commission to adopt regula-

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commercials only at the beginning and ending of each program and at natural breaks; no such restriction is imposed upon commercial broadcasters. Moreover, the Commission's Memorandum Opinion and Order in this proceeding (Pet. App. D, at 59-61) expressly warns CATV systems that if their origination of programming is too successful and attracts too large an audience the Commission might find it necessary to limit such program endeavors by preventing CATV from carrying programs of the type which have proved to be most popular on television and it is told that this will happen "at the first indication of the need therefor."

In light of this history of Commission attitude it is ironic to read in the Government's Brief (p. 18) that "cablecasting by CATV operators now provides a practical means for augmenting program diversification beyond the limitations inherent in the broadcast spectrum—a means that will be wasted if CATV operators are permitted to transfer the same limitations into their own activities by restricting their operations to the transmission of broadcast materials." CATV systems do not so desire to restrict their activities. They want to be free to originate programming, but not compelled to do so. The Commission would compel origination but would place obstacles in the path of effective programming by CATV operators.

tions governing programming undertaken by CATV systems. What the Court below held was that the Commission could not compel CATV systems to orginate programming. But the absence of such a power would no more open the door to disparate state and local regulation of CATV than has the absence of Commission power to compel persons to operate broadcast stations.

## II.

## THE MANDATORY ORIGINATION RULE CANNOT BE SUSTAINED ON A THEORY OF BENEFIT CONFERRED

Both in the Commission's opinions adopting the mandatory originaton rule [17] and in the Government's Brief the attempt is made to construct the "requisite nexus" between the mandatory origination rule and the Commission's statutory responsibilities by arguing that, since the principal product of CATV systems is the retransmission of broadcast signals and since CATV systems "serve the same functions in many areas as broadcasters", CATV operators may be required "to meet some of the same basic standards of responsibility to the public that are imposed on broadcasters." (Br. 17) The short answer to this argument is that CATV systems do not serve the same function as broadcasters unless they originate programs. And it is the right of CATV operators to refrain from being compelled to originate programs and still remain in business which is the only issue involved in this case. The question as to the power of the Commission to require CATV operators who do originate program to meet the same basic responsibilities to the public as

[17] See *e.g. First Report and Order,* Pet. App. C, at 34, 38, 39, 48, 50-51, 52; *Memorandum Opinion and Order,* Pet. App. D, at 59-61.

broadcasters was not passed upon by the Court below and the Commission's detailed rules and regulations which are designed to achieve this objective remain in full effect.

In its simplest terms the Commission's rationale is that the mandatory origination rule may be sustained on the grounds that it is a quid pro quo for a benefit conferred upon CATV systems by the Commission. The benefit conferred is that CATV systems earn their revenues by carrying broadcast signals, that this carriage of signals takes place only pursuant to Commission authorization and that the continued carriage of the signals may, therefore, be conditioned upon the CATV systems undertaking other activities which the Commission deems to be in the public interest.

The Commission's benefit-conferred theory is subject to two defects. First, it is not true that the Commission confers authority upon CATV systems to receive broadcast signals and transmit them to subscribers. This is a right which exists independently of the Commission and which was exercised by CATV systems long before the Commission took cognizance of their activities. In this regard CATV is no different from the ordinary home owner who buys a receiver and installs an antenna or the manufacturer of television sets who constructs sets and sells them to the public so they can receive broadcast signals, or businessmen who construct and install antennas on homes enabling home owners to receive the signals which have been dedicated to the public by broadcast stations. *Fortnightly Corp.* v. *United Artist Television, Inc.*, 392 U.S. 390 (1968). True, the activity of any such persons may constitute communication by wire or radio and hence be subject to appropriate Commission regulation.

It does not follow from the fact that the Commission may have the authority to regulate a communication activity in appropriate instances that the right to engage in the activity is conferred by the Commission. *Cf. Nebbia* v. *New York,* 291 U.S. 502, 531 (1934); *Munn* v. *Illinois,* 94 U.S. 113 (1877).

Secondly, even if it can be assumed arguendo that the right to engage in CATV reception activities is conferred upon the companies by the Commission and can be withheld in appropriate circumstances, this does not mean that the Commission can condition the exercise of the right upon the CATV operator relinquishing rights to which it is lawfully entitled or undertaking activities which the Commission has no independent authority to require. The holding of the Court below was based upon its finding that CATV systems are engaged in the business of receiving and retransmitting television signals to subscribers, that this business is unrelated to the business of producing and distributing original programs and that, therefore, CATV operators could not be required, as a condition of remaining in the CATV business, "to engage in the entirely new and different business of originating programs." (Pet. App. A, at 23-24).

The Court below was clearly correct. First, as previous decisions of this Court have recognized, CATV systems are engaged in the business of receiving and retransmitting programs originated by television broadcast stations. *Fortnightly Corp.* v. *United Artist Television, Inc., supra; United States* v. *Southwestern Cable Co., supra* at 163. The reception-retransmission activities of CATV systems are purely passive—the CATV operator erects an antenna, installs head-end equipment, captures signals which have been dedicated

to the public use by broadcast stations and distributes them to subscribers. In *Fortnightly,* this Court plainly spelled out the distinction which exists between the business engaged in by CATV operators and that engaged in by broadcasters as follows (392 U.S. 390, 399-401:[18]

> . . . Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.
>
> The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing,

[18] Indeed this Court was careful to point out in its opinion (392 U.S. at 392, fn. 6) that even for copyright purposes a CATV system which originates programming is not necessarily the same type of business activity as a CATV system which restricts its role to reception and distribution of broadcast signals.

> whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.

The Court below correctly recognized the fundamental distinction between the business of operating a CATV system and the business of originating programs and elaborated upon this distinction as follows (Pet. App. A, at 24):

> Entering into the program origination field involves various substantial expenditures. Costly equipment must be purchased. Personnel must be employed who are skilled in photography, sound production, program planning and direction, and in performing. Such expenses will often prove burdensome because of the limited area the program will reach. See Federal Regulation of Cable Television; The Visable Hand, Chazen & Ross, 83 Harvard L. Rev. 1820.

The Commission has itself recognized that the operation of a cablecasting system requires investment in facilities and personnel not normally associated with the operation of a CATV system. This recognition is implicit in the estimates of the costs involved in converting a CATV reception-distribution system to a cablecasting system which are set forth in the *First Report and Order* (Pet. App. C, at 40-41). These estimates indicated that the cost would range from $27,300 for a basic black and white system to $95,000 for a full color system and that annual operating costs would range from $14,300 for black and white system

to $33,000 for color operations.[19] A review of the various factors involved in these costs estimates leaves no doubt that cablecasting is not merely an adjunct of CATV operations but is, as the Court below found, an entirely different business activity requiring different equipment, materials and personnel.

Second, in view of the fact that CATV operators and cablecasting operations are wholly different businesses, the Court below correctly ruled that the Commission was without authority to condition the right of persons to engage in CATV operations upon their becoming program originators. This holding did not depend upon a resolution of the question of the extent of the Commission's authority to adopt reasonable regulations concerning any other aspects of the operations of CATV systems. A long line of decisions of this Court relating to the limits of the power of the Government to regulate the conduct of businesses affected with a public interest clearly establishes that the Commission cannot condition the right of CATV opertors to engage in CATV reception activities on their relinquishing rights to which they are lawfully entitled or undertaking other activities for the benefit of the public *Interstate Commerce Commission* v. *Oregon-Washington R.R. & Nav. Co.* 288 U.S. 14 (1933); *Delaware, Lackawanna & Western R. Co.* v. *Morristown,* 276 U.S. 182 (1928); *Frost & Frost Trucking Co.* v. *Railroad*

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[19] In a *Memorandum Opinion and Order in Docket No. 18397,* 27 FCC 2d 778 (1971) (Pet. App. E, at 66) issued in response to Midwest's petition for a stay of the mandatory origination rules pending action by the Court below, the Commission acknowledged that the actual costs of converting to and operating an origination system may be substantially higher than the estimates contained in the *First Report and Order.*

*Commission*, 271 U.S. 583 (1926); *Northern Pacific R.R. Co.* v. *North Dakota ex rel. McCue*, 236 U.S. 585 (1915).[20]

*Frost & Frost* and *Northern Pacific* are directly in point. *Frost & Frost* dealt with the validity of a California statute which provided that persons engaged in the transportation of persons or goods over California highways could continue to operate on the roads of California only upon becoming common carriers. Mr. Frost, who was engaged in the business of private contract carriage and who used the roads of California for that purpose, challenged the constitutionality of the statute. The California Supreme Court held that the state did not have the authority to compel Frost to

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[20] These are only a few of the decisions of this Court stretching over a period of nearly a century which recognize the constitutional limits of the power of government to impose conditions upon the conduct of businesses or to limit the exercise of personal rights. Other cases in which the principle involved in these cases has been recognized are: *Michigan Public Utilities Commission* v. *Duke*, 266 U.S. 570 (1925); *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922); *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105 (1918); *Missouri Pacific R. Co.* v. *Nebraska*, 164 U.S. 403 (1896); *Cf. Jones* v. *State Board of Education*, 397 U.S. 31, 34 (1970) (dissenting opinion of Justice Douglas); *Thorpe* v. *Housing Authority*, 386 U.S. 670, 679 (1967) (concurring opinion of Justice Douglas); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956); *Nebbia* v. *New York*, 291 U.S. 502 (1934); *Munn* v. *Illinois*, 94 U.S. 113 (1877).

The constitutional limits of governmental regulatory authority established by the foregoing cases have also been recognized and applied by State courts and Federal administrative agencies. See *e.g.*, *Town of Beloit* v. *Public Service Commission*, 34 Wis. 2d 145, 148 N.W. 2d 661 (1967); *Utah Power & Light Co.* v. *Public Service Commission*, 122 Utah 284, 249 P.2d 951 (1952); *Georgia Power Co.* v. *Georgia Public Service Commission*, 211 Ga. 223, 85 S.E. 2d 14 (1954); *Hollywood Chamber of Commerce* v. *Railroad Commission*, 192 Cal. 307, 219 P. 983 (1923); *Panagra Terminal Investigation*, 4 CAB 670 (1944).

convert his business from that of a private carrier to a public carrier. It did hold, however, that the state had the power to grant or altogether withhold from its citizens the privilege of using its public highways for the purpose of transacting private business thereon and that since the legislature could entirely withhold the right of using the public highways for private business, it could grant that right on such conditions as it saw fit to impose. Accordingly, the California court held that it was appropriate to condition the special privilege which Frost enjoyed of using the public highways for his private business on Frost's dedicating his property to the quasi public use of public transportation; that Frost was not obliged to submit himself to the condition, but if he did not, he would lose the privilege of using the highway.

This Court disagreed, holding the state action to be unconstitutional. The Court pointed out that the statute in question did not in any way constitute a regulation of the use of public highways in that it was not in any way designed to protect or conserve the highways. As the Court stated (271 U.S. at 593):

> There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guarantees, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though,

> in form voluntary, in fact lacks none of the elements of compulsion. Having regard to the form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.

*Northern Pacific* involved the question of the power of the state of North Dakota to fix intrastate rates for the carriage of lignite coal at a rate which would be less than the carrier's costs or which would provide the carrier with no substantial compensation in addition to its costs. The state had set low rates for the intrastate carriage of lignite coal in order to serve the public interest of the people of North Dakota by encouraging the development of the local lignite coal industry. The Supreme Court of North Dakota held that, as the rates which the railroads were allowed to charge for carriage of other commodities were sufficiently high to permit them to earn a substantial profit on their overall operations in the state, the state had the power to fix the intrastate rate for the carriage of lignite coal at a rate which was less than compensatory to the carriers. This Court reversed, holding that the action of the State of North Dakota was unconstitutional as being equivalent "to an appropriation of property to public uses upon terms to which the carrier had in no way agreed." (236 U.S. at 598). In reaching this result, the Court summarized the principles to be applied in deciding the constitutionality of the state's action as follows (236 U.S. at 595):

> The railroad property is private property devoted to a public use. As a corporation, the owner is

subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public duties, and the state, within the limits of its jurisdiction, may enforce them. . . .

But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement.

The principles enunciated by this Court in *Frost & Frost* and *Northern Pacific* are dispositive of this case. To the extent that CATV operators have dedicated their property to a public purpose and are subject to the regulatory authority either of the Commission or state or local regulatory agencies, they may be regu-

lated in the public interest to insure that they adequately discharge the obligations to the public inherent in the nature of their business. They may not, however, be required to devote their property to other public purposes, nor may restrictions be imposed upon their operations which are not reasonably concerned with the conduct of the reception-distribution function they have undertaken to perform. The mandatory origination rule clearly has no bearing upon the adequacy with which CATV systems are performing this function. Nor does the rule involve the reasonableness of the terms on which CATV systems will make their service available to the public. The Commission, in fact, has never attempted to demonstrate that the rule in any way concerns the quality of service that the public is receiving from CATV systems or the reasonableness of the terms on which the service is made available. Rather, the Commission, in the belief that the public interest would be served by the establishment of additional outlets for local self expression, leaps to the conclusion that CATV systems with a minimum number of subscribers should be required to provide these outlets. The authorities cited above clearly establish that regardless of how great a public need there may be for additional outlets of local self expression, the Commission is without authority to single out CATV operators and require that they devote their property to the satisfaction of this public need.

The consequences of approving the Commission's theory of regulation would be staggering. If the Commission can legally condition the right of a CATV system to remain in business upon its undertaking to originate programs, what is there to stop it from requiring a CATV system—or a broadcast station—to

publish a daily newspaper in its community?[21] Surely the public need served by a newspaper is at least as important as a broadcast station. And there are many more communities which lack a newspaper than a radio station. If the analogy is deemed to be too far fetched—since publication of newspapers is not within the Commission's jurisdiction—the illustration can be brought directly within the Commission's ambit by inquiring as to whether the Commission could order FM stations, as a condition to their right to survive, to transmit newspaper by facsimile.[22] What the Commission is attempting to accomplish by its order is tantamount to a government ukase to a company like General Motors that its right to continue in the business of manufacturing cars and trucks could be terminated unless it agreed to enter the business of manufacturing helicopters. Or the same argument could justify a

[21] The business of operating a CATV system is closely analogous to the business of operating a newspaper distributorship and the requirement that CATV systems originate programs as a condition of remaining in business may properly be analogized to a requirement that newspaper distributors, as a condition of remaining in business, publish and distribute to their subscribers a local news supplement. Since there are presently only three daily newspapers of general circulation published in Washington, D.C., it would not be unreasonable for the government of that city to conclude that the public interest would be served by the establishment of additional newspapers devoted to local news, events and advertising. Can there be any doubt, however, that the Government of the city would be exceeding the limits of its authority if it were to require that all persons engaged in the business of distributing out-of-town newspapers to subscribers in the City of Washington must, as a condition of remaining in such business, publish and distribute to their subscribers a daily local news supplement in order to satisfy this public need?

[22] See § 73.266 of the Commission's Rules and Regulations, 47 C.F.R. § 73.266, *permitting* but *not* requiring FM stations to transmit facsimile.

municipality which has granted appropriate licenses for a corner grocery store to require it to open a dry goods store as a condition of its right to continue to hold a license. Even in wartime, Government powers have not been extended to this extent.

## CONCLUSION

For the foregoing reasons it is urged that the judgment of the Court below should be affirmed.

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